200 of the Accomplishment Instructions of that service bulletin.

(e) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, New York Aircraft Certification Office (ACO), ANE–170, FAA, Engine and Propeller Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, New York ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the New York ACO.

(f) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(g) The inspections, measurement, repair, and restoration shall be done in accordance with de Havilland Service Bulletin S.B. 8–73–18 (for Model DHC–8–100 series airplanes), or de Havilland S.B. 8–73–19 (for Model DHC–8–300 series airplanes), both dated April 29, 1994. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Bombardier Inc., Bombardier Regional Aircraft Division, Garratt Boulevard, Downsview, Ontario, Canada M3K 1Y5. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at FAA, Engine and Propeller Directorate, New York Aircraft Certification Office, 10 Fifth Street, Third Floor, Valley Stream, New York; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(h) This amendment becomes effective on May 30, 1995.

Issued in Renton, Washington, on April 20, 1995.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 95–10203 Filed 4–27–95; 8:45 am]

BILLING CODE 4910–13–U

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34–35637; File No. S7–4–95]

RIN 3235–AG28

Unlisted Trading Privileges

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission is adopting new rules and amendments to existing rules concerning unlisted trading privileges (''UTP''). The rules would reduce the period that exchanges have to wait before extending UTP to any listed initial public offering, from the third trading day in the security to the second trading day in the security. The rules also would require exchanges to have rules and oversight mechanisms in place to ensure fair and orderly markets and the protection of investors with respect to UTP in any security.

EFFECTIVE DATE: April 21, 1995.

FOR FURTHER INFORMATION CONTACT: Betsy Prout, 202/942–0170, Attorney, Office of Market Supervision, Division of Market Regulation, Securities and Exchange Commission (Mail Stop 5–1), 450 5th Street, N.W., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION:

I. Introduction

On February 2, 1995, the Securities and Exchange Commission (''Commission'') proposed for comment rules [1] under Section 12(f) of the Securities Exchange Act of 1934 (''Exchange Act''),[2] as recently amended by the Unlisted Trading Privileges Act of 1994 (''UTP Act''). The proposed rules would have: (1) Required national securities exchanges (''exchanges''), for any security that is the subject of an initial public offering (''IPO'') and is listed on another exchange (''listed IPO''), to wait until the listing exchange reports the first trade in the security to the Consolidated Tape before trading the security pursuant to unlisted trading privileges (''UTP''); (2) required each national securities exchange to have in effect a rule or rules providing for transactions in the class or type of security to which the exchange extends UTP; and (3) amended certain existing rules under Section 12(f) of the Exchange Act to conform to the recent statutory amendments effected by the UTP Act. The Commission also requested comments on alternatives to the proposed rule concerning UTP in listed IPOs from commenters who believe that either no waiting period or a longer waiting period would be appropriate. In addition, the Commission requested comment on whether any Commission action is necessary to carry out the congressional objectives of linked markets as required by Section 11A(a)(1)(D) of the Exchange Act.[3]

The Commission received nine comment letters on the proposed rules,[4] eight of which discuss the proposed rule concerning UTP in listed IPOs.[5] The Commission also received, prior to publication of the proposed rules in the **Federal Register**, a report presenting certain volume and price parameter statistics of listed IPOs.[6]

The Commission is adopting the rules as proposed, except for the rule that would have required exchanges to wait, before extending UTP to listed IPOs, until the first trade is reported by the listing exchange. Instead, that proposed rule is being replaced with a requirement that exchanges wait, before trading a listed IPO pursuant to UTP, until the opening of business on the day following the initial public offering of the security on the listing exchange.

II. Background

As stated above, the Commission is adopting rules pursuant to the UTP Act, which recently amended Section 12(f) of the Exchange Act. The UTP Act became effective on October 22, 1994. As discussed more fully in the Proposing Release and below, the UTP Act amended Section 12(f) of the Exchange Act to require the Commission to prescribe rules concerning UTP in listed IPOs. Rule 12f–2, as adopted, meets this requirement. The UTP Act also authorizes the Commission to prescribe other rules pertaining to exchange extensions of UTP, and specifically authorizes the Commission to prescribe, by rule or order, the procedures that will apply to exchanges when they apply to reinstate UTP in a security after the Commission has suspended UTP in the security on the applicant exchange.

Section 12(f) governs when an exchange may trade a security that is

[1] See Securities Exchange Act Release No. 35323 (February 2, 1995), 60 FR 7718 (''Proposing Release'').

[2] 15 U.S.C. 78*l*.

[3] 15 U.S.C. 78k–1(a)(1)(D).

[4] See letters from James F. Duffy, American Stock Exchange, Inc., dated March 21, 1995 (''Amex letter''), George W. Mann, Boston Stock Exchange, Inc., dated March 6, 1995 (''BSE letter''), Lisa W. Barry, CS First Boston, dated March 14, 1995 (''CS First Boston letter''), J. Craig Long, Foley & Lardner, dated March 20, 1995 (''Chx letter''), Richard T. Chase, Lehman Brothers, dated March 10, 1995 (''Lehman letter''), James E. Buck, New York Stock Exchange, Inc., dated March 15, 1995 (''NYSE letter''), Leopold Korins, Pacific Stock Exchange, Inc., dated March 14, 1995 (''PSE letter''), John C. Katovich, Pacific Stock Exchange, Inc., dated March 29, 1995 (''PSE response''), and William Uchimoto, Philadelphia Stock Exchange, Inc., dated March 29, 1995 (''Phlx response''), to Jonathan G. Katz, Secretary, SEC.

[5] See BSE letter, Chx letter, CS First Boston letter, Lehman letter, NYSE letter, PSE letter, Phlx response, and PSE response, *id*.

[6] See letter and report from William Uchimoto, Philadelphia Stock Exchange, Inc., dated February 6, 1995 (''Phlx Study''). The Phlx Study was submitted to the Commission on behalf of the Boston Stock Exchange, Inc., the Chicago Stock Exchange, Inc., the Philadelphia Stock Exchange, Inc., and the Pacific Stock Exchange, Inc.

not listed and registered on that exchange, *i.e.* by extending UTP to the security.[7] Prior to the UTP Act, Section 12(f) required exchanges to apply to the Commission before extending UTP to a security, and required the Commission to provide notice of each application for comment and opportunity for a hearing. The Commission also was required to review each application, and if the application met certain standards, the Commission issued an order approving the exchange's request to trade the security pursuant to its grant of UTP.[8] These requirements caused significant delays before exchanges could begin UTP trading in securities already traded on the listing exchange, even though over-the-counter (''OTC'') dealers were not subject to UTP limitations.[9] The delay in trading, resulting from the previous application procedures, was especially criticized by competing exchanges because, while the Commission published for comment hundreds of exchange applications for the extension of UTP each year, comments on the applications were extremely rare. Indeed, virtually no comments had been submitted to the Commission on a UTP application in over ten years.

In response to the Concept Release that initiated the Market 2000 Study,[10] resulting in the Division of Market Regulation's (''Division'') report, Market 2000: An Examination of Current Equity Market Developments, some commenters noted that the regulatory process for UTP could be a potential area for reform.[11] After publication of the Concept Release, on June 22, 1994, the Telecommunications and Finance Subcommittee of the House Committee on Energy and Commerce (''Subcommittee'') held a hearing on the UTP Act, ultimately adopted on October 22, 1994.[12]

The UTP Act, among other matters, removed the application, notice, and Commission approval process from Section 12(f) of the Exchange Act, except in cases of Commission suspension of UTP in a particular security on an exchange. Thus, the UTP Act generally allows an exchange to extend UTP to any security when it becomes listed and registered on another exchange or included in Nasdaq, subject to certain limitations.[13]

Specifically, the UTP Act grants exchanges the authority to trade any security via UTP immediately upon listing on another exchange, provided that the security is not a listed IPO security, as defined in the UTP Act.[14] For listed IPO securities, the UTP Act contains a temporary provision that requires exchanges to wait, before trading any listed IPO security, until the third day of trading in the security on the listing exchange. This provision also requires the Commission to prescribe by rule or regulation, within 180 days of the enactment of the UTP Act, the mandatory delay (or, ''duration of the interval''), if any, that should apply to UTP extensions to listed IPO securities.[15]

The UTP Act also provides the Commission with rulemaking authority to prescribe additional procedures or requirements for exchange extensions of UTP to any security, and allows the Commission summarily to suspend UTP in a security at any time within 60 days of the commencement of trading on the relevant exchange pursuant to UTP. Upon suspension, the exchange must cease trading pursuant to UTP in the security. An exchange seeking to reinstate UTP in the security, following a Commission suspension, must file an application with the Commission pursuant to procedures that the Commission may prescribe by rule or order for the maintenance of fair and orderly markets, the protection of investors and the public interest, or otherwise in furtherance of the purposes of the Exchange Act. Public notice by the Commission of an exchange application to reinstate suspended UTP, and Commission review of the application, are also required. The amended Section 12(f) notice, review, and Commission approval provisions are substantially similar to the requirements that previously applied to an exchange's initial extension of UTP to a security under former Section 12(f).[16]

III. Extensions of UTP to Listed Securities That Are the Subject of an Initial Public Offering

A. Proposed Rule 12f–2

Proposed Rule 12f–2 would have allowed exchanges to extend UTP to a listed IPO security when at least one transaction in the security had been effected on the listing exchange and the

[7] When an exchange ''extends UTP'' to a security, the exchange allows its members to trade the security as if it were listed on the exchange. For discussions of the history of UTP in U.S. markets and Section 12(f) of the Exchange Act, see, *e.g.*, Stephen L. Parker & Brandon Becker, Unlisted Trading Privileges, 14 Rev. Sec. Reg. 853 (1981); and Walter Werner, Adventure in Social Control of Finance: The National Market System for Securities, 75 Colum. L. Rev. 1233 (1975).

[8] Section 12(f) required the Commission to review each UTP application to ensure the maintenance of fair and orderly markets and the protection of investors with respect to the extension of UTP to the securities named in the application. Pursuant to this standard of review, the staff identified, over time, certain areas of particular concern as they related to UTP. Accordingly, these areas included ensuring that the applicant exchange had proper trading rules in place to provide a fair and orderly market in each security named and had sufficient standards for regulatory oversight of each security to provide for the protection of investors. While Commission review of the applications led to occasional discoveries of material deficiencies and errors in the applications, the overwhelming majority of applications raised no substantive issues.

[9] As a technical matter, Section 12(a) limits the trading of securities on an exchange to those securities that are listed and registered on that exchange. Section 12(f), both prior to and following this amendment, makes an exemption from this requirement for securities traded pursuant to UTP. OTC dealers are not subject to the Section 12(a) listing requirement because they do not transact business on an exchange.

[10] See Securities Exchange Act Release No. 30920 (July 14, 1992), 57 FR 32587 (''Concept Release'').

[11] See letter from William G. Morton, Jr., Boston Stock Exchange; John L. Fletcher, Midwest (currently Chicago) Stock Exchange; Leopold Korins, Pacific Stock Exchange; and Nicholas A. Giordano, Philadelphia Stock Exchange, to Jonathan G. Katz, Secretary, Commission, dated December 11, 1992. See also, Division of Market Regulation, Securities and Exchange Commission, Market 2000: An Examination of Current Equity Market Developments (January 1994).

[12] A representative of the Division and representatives of several self-regulatory organizations testified at this hearing. The Unlisted Trading Privileges Act of 1994 and Review of the SEC's Market 2000 Study: Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 103d Cong., 2d Sess. (1994) (''UTP Hearing'').

[13] Section 12(f)(1)(E) prohibits extension of unlisted trading privileges in securities that are registered under Section 12(g) of the Exchange Act (generally, ''OTC securities''), except pursuant to a rule, regulation or order of the Commission approving such extension or extensions. The Commission's order approving the on-going pilot program, including all limitations and conditions therein, is deemed such an order. See Securities Exchange Act Release No. 34371 (July 13, 1994), 59 FR 37103. Pursuant to Section 12(f)(1)(E), the Commission will consider issues involved in extensions of UTP to OTC securities as the Commission continues it on-going review of the operation of the pilot program.

[14] Section 12(f)(1)(B), read jointly with Section 12(f)(1)(A)(i), as amended, provides this exception for listed IPO securities. In defining securities that fall within the exception, new subparagraphs 12(f)(1)(G)(i) and (ii) provide:

(i) a security is the subject of an initial public offering if—

(I) the offering of the subject security is registered under the Securities Act of 1933; and

(II) the issuer of the security, immediately prior to filing the registration statement with respect to the offering, was not subject to the reporting requirements of section 13 or 15(d) of this title; and

(ii) an initial public offering of such security commences at the opening of trading on the day on which such security commences trading on the national securities exchange with which such security is registered.

15 U.S.C. 78*l*(f)(1)(G).

[15] 15 U.S.C. 78*l*(f)(1)(C). The UTP Act temporary two-day delay provision for UTP in listed IPOs expires on the earlier of the effective date of a Commission rule prescribing the appropriate interval of delay, if any, or 240 days following the enactment of the UTP Act.

[16] See Section 12(f)(2), as amended, 15 U.S.C. 78*l*(f)(2).

transaction had been reported pursuant to an effective transaction reporting plan as defined in Rule 11Aa3–1 under the Exchange Act.[17] The proposed rule, therefore, would have shortened the mandatory waiting period (or ''interval,'' as it is described in the UTP Act) for UTP in listed IPO securities from two trading days, as temporarily specified by amended Section 12(f),[18] to the time that it takes to effect and report the initial trade in the security on a listing exchange. The result of the proposed rule would have been to permit the regional exchanges to trade listed IPOs at essentially the same time as the primary listing exchange.

The Commission proposed a one-trade delay for UTP in listed IPOs because the Commission preliminarily believed that it was appropriate to minimize regulatory restraints on competition for trading listed IPO securities. In soliciting comments on proposed Rule 12f–2, however, the Commission noted a previous New York Stock Exchange (''NYSE'') position that listed IPOs should be traded solely on the listing market for a ''short'' period of time to help ensure market efficiency immediately following the IPO.[19] The Commission also cited a report on the UTP Act by the House Committee on Energy and Commerce (''Committee''), in which the Committee directed the markets to provide the Commission with trading activity data on the effects of UTP in IPOs (including, for example, any volatility effects on the security), so that the Commission could determine whether the benefits of confining early trading in IPOs to one marketplace would be outweighed by the benefits of removing regulatory delays that inhibit competition among markets.[20]

The Commission solicited comments on these issues, specifically seeking comments on certain items that would be particularly useful to the Commission. These included identification and analysis of the potential harms and benefits that would result from either no waiting period, or from a longer waiting period than that proposed by the Commission. To the extent that commenters believed a waiting period would be appropriate, the Commission requested that they provide data to illustrate the potential negative effects on the pricing of an IPO. The Commission also suggested that commenters might provide an analysis of the effects of the two-day waiting period temporarily in effect under the UTP Act. Finally, the Commission stated that it would be interested in receiving alternative proposed rules from commenters who believe that either no waiting period or a longer waiting period would be appropriate.

In addition, the Commission sought comment on whether any Commission action would be necessary under Section 12(f), as amended, in order to carry out the congressional objectives of linked markets as required by Section 11A(a)(1)(D).[21] Specifically, the Commission requested comment on whether changes should be made to the consolidated quotation, trade reporting, and order routing systems, now that exchanges and linking facilities will have less time to prepare for multiple exchange trading in the securities. The Commission expressed particular interest in receiving comments concerning any existing procedural delays that should be corrected by Commission action to ensure that the operation of amended Section 12(f) is not impeded.

B. Comments on Proposed Rule 12f–2

The Commission received a total of eight comment letters on proposed Rule 12f–2, five of which supported the proposed rule,[22] and three of which opposed the proposal.[23] Shortly prior to the publication of the proposed rules, the Commission also received a study from the Philadelphia Stock Exchange (''Phlx''), submitted on behalf of the Boston Stock Exchange, Inc., the Chicago Stock Exchange Inc., and the Pacific Stock Exchange Inc., concerning certain volume and pricing characteristics of listed IPOs.[24]

The Phlx Study shows high volume in IPOs during the early days of trading, particularly on the first and second day of trading. Based on this data, the Phlx Study states that a restriction on UTP in IPOs creates a substantial negative effect on competition, both in relation to the listing exchange and OTC dealers.[25] The Phlx Study concludes that the Commission should adopt a rule for UTP in listed IPOs that would allow the regional exchanges to trade the securities on the first day of trading.

These competitive concerns were reiterated by the other comment letters supporting the proposed rule.[26] One regional exchange also states that it has listed IPOs simultaneously with the NYSE and has seen no adverse effect related to the dual listings.[27] This exchange argues that the NYSE has not been able to identify any adverse effects from the dual listing of IPOs. Another regional exchange states that, since the UTP Act reduced the waiting period to two days, there have been no instances of pricing disparities, inordinate volatility, or issuer complaints for securities traded by regional exchanges on the third trading day of IPOs, and no offering has been adversely affected by regional trading.[28]

The Commission received three comment letters, one from the NYSE and two from underwriters, expressing opposition to proposed Rule 12f–2.[29] These commenters believe that immediate regional exchange trading of IPOs would increase price volatility in the trading of IPO securities because the underwriters would not have sufficient time to ensure an orderly distribution of the securities. Two of the commenters argued that the temporary two-day delay should continue in place,[30] while the third commenter recommends at the very least a one-day trading delay.[31] Those proposing a two-day delay base their recommendation on data compiled by Lehman Brothers (''Lehman Study''), showing higher volatility in some Nasdaq IPOs than in selected NYSE IPOs. The two letters assert that this data demonstrates that dispersed initial trading of IPOs in the Nasdaq market is more volatile than initial centralized trading of IPOs.

The Commission received two comment letters from two regional exchanges in response to the comments opposing the proposed rule.[32] One of these commenters believes that National Market System procedures and practices are capable of providing effective

[17] 17 CFR 240.11Aa3–1 (1991).

[18] See supra note 15.

[19] See Proposing Release, *supra* note 1, citing prepared testimony of Edward A. Kwalwasser, Executive Vice President, Regulation, New York Stock Exchange, UTP Hearing, *supra* note 12.

[20] See Proposing Release, *supra* note 1, citing H.R. Rep. No. 626, 103d Cong., 2d Sess. (1994). The Committee also identified the experience of third market trading in listed IPOs as relevant to this inquiry.

[21] Section 11A(a)(1)(D) of the Exchange Act provides:

The linking of all markets for qualified securities through communication and data processing facilities will foster efficiency, enhance competition, increase the information available to brokers, dealers, and investors, facilitate the offsetting of investors' orders, and contribute to best execution of such orders.

15 U.S.C. 78k–1(a)(1)(D).

[22] See BSE letter, Chx letter, PSE letter, Phlx response, and PSE response, *supra* note 4.

[23] See CS First Boston letter, Lehman letter, and NYSE letter, *supra* note 4.

[24] See Phlx Study, *supra* note 6.

[25] See *supra* note 9.

[26] See BSE letter, Chx letter, and PSE letter, *supra* note 4.

[27] See Chx letter, *supra* note 4.

[28] See PSE letter, *supra* note 4.

[29] See NYSE letter, CS First Boston letter, and Lehman letter, *supra* note 4.

[30] See NYSE letter and Lehman letter, *supra* note 4.

[31] See CS First Boston letter, *supra* note 4.

[32] PSE response and Phlx response, *supra* note 4.

pricing for IPOs, contrary to the concerns voiced by the opposing comment letters.[33] The commenter also believes that only upward price volatility risk exists for early IPO trading, particularly because underwriters may place stabilizing bids in IPOs to limit declines in the prices of the securities.

The second response letter reiterates these points, and also notes that regional exchange opening, high, low, and closing prices in IPOs that were dually-listed among one regional exchange and the NYSE were consistent with NYSE comparable prints.[34] In addition to providing its reasons for believing that price volatility in early trading of IPOs is limited to upward movements in the price of the security, the commenter also concludes that price volatility is generated by supply and demand in securities and that, as a natural by-product of a free and open market, price volatility should never be used as a reason to exclude some equally-regulated competitors from the marketplace.[35]

C. Commission Response

The Commission is adopting a revised version of Rule 12f–2. Instead of requiring exchanges to wait until the listing exchange of an IPO reports the first trade in the security to the Consolidated Tape, as originally proposed, exchanges will be required to wait, before trading the security pursuant to a grant of UTP, until the opening of business on the day following the IPO. For the reasons discussed below, the Commission believes that this ''one-trading-day'' delay for UTP in listed IPOs is appropriate for the maintenance of fair and orderly markets, the protection of investors, and otherwise in furtherance of the purposes of the Exchange Act, as required by the UTP Act.

As a general matter, the Commission agrees with the regional exchanges that early UTP in IPO securities would enhance the ability of multiple markets to compete with the listing exchange for the substantial volume occurring on the initial trading days of IPOs. As discussed below, however, several commenters raise the possibility that virtually immediate UTP in IPO securities could complicate the pricing and orderly distribution of IPO securities by increasing the risk of price volatility as the securities are distributed immediately to the public. In light of these concerns, and in particular those raised by the underwriters who believe that IPO pricing may be at risk if there were no opportunity for early centralized trading, the Commission is adopting a rule to provide a one-trading-day delay for UTP in IPO securities.

The Commission believes that a one-trading-day delay to precede UTP in listed IPOs is appropriate at this time primarily because the Commission is concerned that the first day of trading in an IPO on an exchange presents special circumstances, including initial pricing, an attempt to effectuate an orderly distribution of securities, high trading volume, and the resulting potential for high price volatility in the securities, that could have a significant effect on pricing and distribution of IPOs. In light of the comments regarding the possible impact of immediate UTP for the IPO process, the Commission believes, therefore, that a one-trading-day delay is warranted in order to ensure the protection of investors as required by the UTP Act, and by the Exchange Act in general.

The Phlx Study and Phlx response discuss the five IPO securities that were dually-listed on one regional exchange and the NYSE, and state that regional trades virtually always occurred within the NYSE daily trading range on the first and second trading days of the IPO. The Commission considers this limited amount of data insufficient to show that immediate UTP will not increase price volatility across the markets. In addition to the limited number of occurrences reviewed, this information only addresses listings on one exchange competing with the listing exchange, rather than the effects of five markets trading the IPO simultaneously with the listing exchange.

The Commission also believes that there is insufficient evidence on the record to warrant a longer waiting period than the first trading day to precede UTP in listed IPOs. It appears that the risk of high price volatility for listed IPOs and the resultant impact on IPO distributions decreases after the first day of trading.

In light of the concerns raised and the limited nature of the trading data available, the Commission is adopting the one-trading-day delay for UTP in listed IPOs. The Commission currently believes that this one-day restriction is necessary and appropriate for the maintenance of fair and orderly markets and the protection of investors with respect to IPOs. This conclusion is premised on the importance of the initial trading of IPOs for the offering process, the concerns raised regarding orderly IPO distribution, and the limited data responding to those concerns.

The Commission is sympathetic to concerns that a one-trading-day delay for exchange extensions of UTP will restrict regional exchange trading, while OTC dealers will continue to be free to trade the securities upon effective registration. The evidence presented in the Phlx study, however, shows that in virtually all IPOs studied, OTC market makers trade the securities only in extremely small volume, if at all, on the first day of the IPO. The Commission believes, therefore, that any competitive advantage to OTC market makers is minimal, and is outweighed by the benefit to investors and the capital formation process that should be accrued by decreasing the risk of price volatility in the IPO securities.

The Commission will continue, of course, to monitor the experience with the trading of IPOs under the amended Rule. The Commission is willing to consider revisiting the question of the appropriate waiting period for UTP in listed IPOs after experience has been gained with the amended rules.

Two commenters who urged adoption of the proposed rule also responded to the Commission's solicitation of comments on any necessary enhancements to National Market Systems to facilitate operation of the UTP Act. One commenter suggested that all ITS Participants should be permitted to participate in the opening on the first day of trading on the listing exchange via the ITS.[36] Another commenter stated that the new UTP trading regimen necessitates more reactive procedures by the ITS Participants and the Securities Industry Automation Corporation (''SIAC''), the ITS facilities manager.[37] The commenter urged SIAC to make ITS automatically available for any UTP security on the day following a regional exchange's request that the security be available for ITS use.

The Commission urges the ITS Participants to enhance their procedures for ITS eligibility of securities. The Commission notes that the ITS Pre-Opening Application and the ITS Trade-Through Rule are designed, in part, to ensure orderly pricing of securities among the various Participant market centers. Thus, the Commission believes that the ITS Participants should move forward to ensure that the ITS is available for use by all interested

[33] PSE response, *supra* note 4.

[34] See Phlx response, *supra* note 4.

[35] As discussed in Section III.C., *infra*, the Phlx response and the Chx letter suggest enhancements to certain Intermarket Trading System (''ITS'') procedures in order to facilitate the extension of unlisted trading privileges pursuant to the new streamlined requirements for UTP under the UTP Act.

[36] See Chx letter, *supra* note 4.

[37] See Phlx response, *supra* note 4.

participant markets in time to participate in the opening trade of a listed IPO security on the second day the security trades.

IV. Exchange Rules for Securities to Which Unlisted Trading Privileges are Extended (Rule 12f–5)

Section 12(f)(1)(D) of the Exchange Act, as amended, authorizes the Commission to prescribe, by rule or regulation, such additional procedures or requirements for extending UTP to any security as the Commission deems necessary or appropriate for the maintenance of fair and orderly markets, the protection of investors and the public interest, or otherwise in furtherance of the purposes of the Exchange Act. Pursuant to this authority, the Commission proposed Rule 12f–5, which would prohibit an exchange from extending UTP to any security unless the exchange has in effect a rule or rules providing for transactions in the class or type of security to which the exchange extends UTP.

The Commission solicited comment on whether proposed Rule 12f–5 would help ensure that an exchange has the necessary rules in place to provide for fair and orderly markets in all securities to which the exchange extends UTP. The Commission received one response to this question.[38] This commenter supported the rule, and requested that the Commission, in this release, clarify that, prior to commencing UTP trading, an exchange should be required to have entered into appropriate information sharing agreements with foreign exchanges (or the Commission with foreign regulators), comparable to that required of the listing exchange for the particular product.[39]

The Commission is adopting Rule 12f–5, as proposed, as a means to ensure that exchanges meet their obligation under the Exchange Act to have these rules and oversight mechanisms in place on their exchanges for the relevant securities before extending UTP to the securities. As discussed in the Proposing Release, the rule is intended to preserve a benefit of Commission review of UTP applications that was required by Section 12(f) prior to the UTP Act. Previously, the Commission reviewed each UTP application to ensure that the applicant exchange had rules in place to cover the trading of the product class of the security for which the exchange applied. Now that the Commission will no longer review UTP applications, the Commission believes that the requirements set forth in Rule 12f–5 are appropriate because the rule confirms to exchanges their obligation to evaluate their extensions of UTP to determine that the exchanges are authorized to list the product class of securities before allowing their members to trade the securities. Finally, in regard to the comment that exchanges must enter into an appropriate information sharing agreement for all securities traded thereon, Rule 12f–5 will ensure that an exchange granting UTP in a security has secured previous Commission approval to trade the product class of security pursuant to Section 19(b) of the Exchange Act.[40] The Commission, in such approval process, will have determined the adequacy of information sharing arrangements for the particular exchange.

V. Amendments to Rules 12f–1 and 12f–3, and Rescission of Previous Rules 12f–2 and 12f–6

Several of the rules prescribed under former Section 12(f) concerned the application process for extensions of UTP. The Commission proposed to amend or rescind these rules to reflect statutory changes, and solicited comment on whether the proposed changes were appropriate. No comments were received on these proposals. The Commission is adopting the amendments to existing Rules 12f–1 and 12f–3, and is rescinding existing Rules 12f–2 and 12f–6, as proposed.

First, Rule 12f–1[41] is amended to limit its operation to an exchange's application to reinstate UTP after a Commission suspension. The amended rule will require essentially the same format for applications to reinstate UTP as was required by the rule under former Section 12(f) for applications to extend UTP. The Commission believes the amendment is an appropriate means to carry out the intention of the new Section 12(f)(2) requirement for exchange UTP applications in cases where exchanges seek to reinstate UTP for a security that was previously suspended by the Commission.

Second, Rule 12f–2 is rescinded and Form 27, referred to in previous Rule 12f–2, is removed.[42] This rule and form dealt with instances where an exchange might have been required to cease extending UTP, and to reapply for UTP, in a security that was ''changed'' (as described in the rule) immaterially for those purposes. The rule and form provide an exemption from reapplication for UTP in these cases. The Commission is rescinding these items because the application procedures, from which the rule provided an exemption, no longer exist.

Third, the Commission is rescinding the last sentence of paragraph (b) of Rule 12f–3.[43] Rule 12f–3 allows the issuer of a security that is traded pursuant to UTP, or any broker or dealer who makes a market in the security, or any other person having a bona fide interest in the question of termination or suspension of UTP in the security, to apply to the Commission for the termination or suspension of UTP in the security. The Rule also identifies the categories of information that should be provided in the application, which include the applicant's statement that it has sent a copy of the application to the exchange from which the suspension or termination is sought. Thereafter, the Rule provides that the exchange may terminate or suspend UTP in the security in accordance with its rules. The Rule also required the exchange, upon suspension or termination, promptly to file Form 28 with the Commission.

This final requirement no longer is necessary because exchanges are no longer required to apply to the Commission to extend UTP to a security. The Commission, therefore, is rescinding that last requirement from the Rule concerning Form 28 and is removing Form 28 to conform further with efforts to streamline the regulatory process concerning UTP.

Finally, the Commission is rescinding Rule 12f–6, which exempted a merged exchange from the UTP application process in certain circumstances.[44] The exemption no longer is necessary because the waiting period that restrained exchanges from extending UTP to most securities no longer exists.

VI. Effects on Competition and Regulatory Flexibility Act Considerations

Section 23(a)(2) of the Exchange Act[45] requires that the Commission, when adopting rules under the Exchange Act, consider the anticompetitive effects of those rules, if any, and balance any anticompetitive impact against the

[38] See Amex letter, *supra* note 4.

[39] The commenter also suggested that the Commission make clear that OTC transactions in exchange-listed securities must be subject to the same regulatory requirements as those imposed by the listing exchange and by other exchanges trading the security pursuant to UTP, which could be accomplished by a amendment to the rules of the National Association of Securities Dealers. The Commission believes that this recommendation is outside the scope of the present rulemaking, which deals specifically with exchange extensions of UTP.

[40] 15 U.S.C. 78s(b).

[41] 17 CFR 240.12f–1 (1991).

[42] 17 CFR 240.12f–2 (1991).

[43] 17 CFR 240.12f–3 (1991).

[44] 17 CFR 240.12f–6 (1991).

[45] 15 U.S.C. 78w(a)(2).

regulatory benefits gained in terms of furthering the purposes of the Exchange Act. The Commission believes that adoption of Rules 12f–2 and 12f–5, and the amendments to Rules 12f–1 and 12f–3, and the rescission of previous Rules 12f–2 (to be replaced with new Rule 12f–2) and 12f–6 will not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Specifically, as discussed in more detail above, the Commission believes that the new Rule 12f–2 one-trading-day delay for UTP in IPOs provides a minimal restraint on competition among market centers which is outweighed by the benefits associated with the resulting reduction of potential price volatility risk in IPO securities. In addition, the one-trading-day delay is shorter than the current temporary two-trading day delay.

The Commission has prepared a Final Regulatory Flexibility Analysis (''FRFA'') regarding the amendments and rescissions to the rules under Section 12(f), in accordance with 5 U.S.C. 604. The FRFA notes the minimal economic effect on the minimal number of small businesses, if any, that may be generated by these amendments to and rescissions of these rules under Section 12(f) of the Exchange Act. In addition, the FRFA notes that Rule 12f–2 should reduce the risk of high price volatility, and possible associated risk of loss to investors, in listed IPOs. The Commission believes that the benefits of reducing risk to investors outweigh the potential costs, if any, that might be incurred by, for example, small specialist firms on regional exchanges.

A copy of the FRFA will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549.

VII. Effective Date

The new rules and amendments to the Commission's rules and forms shall be effective immediately, in accordance with the Administrative Procedure Act, which allows effectiveness in less than 30 days after publication for, inter alia, ''a substantive rule which grants or recognizes an exemption or relieves a restriction.'' 5 U.S.C. 553(d)(1). Moreover, the Administrative Procedures Act allows for accelerated effectiveness ''as provided by the agency for good cause and published with the Rule.'' 5 U.S.C. 553(d)(3). Accelerated effectiveness of the rules and amendments is necessary in order to ensure compliance with the UTP Act, which requires the Commission to prescribe the duration of the waiting period, if any, for UTP in listed IPOs ''[n]ot later than 180 days after the date of enactment of the Unlisted Trading Privileges Act of 1994 * * *.''[46]

List of Subjects in 17 CFR Parts 240 and 249

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, the Commission hereby amends title 17, chapter II of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78i, 78j, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78w, 78x, 78*ll*(d), 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

2. Section 240.12f–1 is amended by revising the section heading and introductory text of paragraph (a), redesignating paragraphs (a)(5) and (a)(6) as paragraphs (a)(6) and (a)(7), adding paragraph (a)(5), and revising newly designated paragraph (a)(6) to read as follows:

§ 240.12f–1 Applications for permission to reinstate unlisted trading privileges.

(a) An application to reinstate unlisted trading privileges may be made to the Commission by any national securities exchange for the extension of unlisted trading privileges to any security for which such unlisted trading privileges have been suspended by the Commission, pursuant to section 12(f)(2)(A) of the Act (15 U.S.C. 78*l*(2)(A)). One copy of such application, executed by a duly authorized officer of the exchange, shall be filed and shall set forth:

(1) * * *

(5) The date of the Commission's suspension of unlisted trading privileges in the security on the exchange;

(6) Any other information which is deemed pertinent to the question of whether the reinstatement of unlisted trading privileges in such security is consistent with the maintenance of fair and orderly markets and the protection of investors; and

* * * * *

3. Section 240.12f–2 is revised to read as follows:

§ 240.12f–2 Extending unlisted trading privileges to a security that is the subject of an initial public offering.

(a) *General Provision*—A national securities exchange may extend unlisted trading privileges to a subject security on or after such national securities exchange opens for trading on the day that follows the day on which the initial public offering of such subject security commences.

(b) The extension of unlisted trading privileges pursuant to this section shall be subject to all the provisions set forth in Section 12(f) of the Act (15 U.S.C. 78*l*(f)), as amended, and any rule or regulation promulgated thereunder, or which may be promulgated thereunder while the extension is in effect.

(c) *Definitions.* For the purposes of this section:

(1) The term *subject security* shall mean a security that is the subject of an initial public offering, as that term is defined in section 12(f)(1)(G)(i) of the Act (15 U.S.C. 78l(f)(1)(G)(i)), and

(2) An *initial public offering commences* at such time as is described in section 12(f)(1)(G)(ii) of the Act (15 U.S.C. 78l(f)(*1*)(G)(ii)).

4. Section 240.12f–3 is amended by revising paragraph (b) to read as follows:

§ 240.12f–3. Termination or suspension of unlisted trading privileges.

* * * * *

(b) Unlisted trading privileges in any security on any national securities exchange may be suspended or terminated by such exchange in accordance with its rules.

5. Section 240.12f–5 is added to read as follows:

§ 240.12f–5 Exchange rules for securities to which unlisted trading privileges are extended.

A national securities exchange shall not extend unlisted trading privileges to any security unless the national securities exchange has in effect a rule or rules providing for transactions in the class or type of security to which the exchange extends unlisted trading privileges.

6. Section 240.12f–6 is removed and reserved.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

7. The authority citation for Part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted;

* * * * *

§§ 249.27 and 248.28 [Removed]

8. Sections 249.27 and 248.28 are removed.

---

[46] Section 12(f)(1)(C), as amended, 15 U.S.C. 78*l*(f)(1)(C).

Dated: April 21, 1995.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–10487 Filed 4–27–95; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 210 and 211

[Docket No. 88N–0320]

Current Good Manufacturing Practice in Manufacturing, Processing, Packing, or Holding of Drugs; Revision of Certain Labeling Controls; Partial Extension of Compliance Date

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; partial extension of compliance date.

SUMMARY: The Food and Drug Administration (FDA) is announcing a continuation of the partial extension of the compliance date for a provision of the final rule, which was published in the **Federal Register** of August 3, 1993 (58 FR 41348). The document revised the current good manufacturing practice (CGMP) regulations for certain labeling control provisions. In the **Federal Register** of August 2, 1994 (59 FR 39255), FDA partially extended the compliance date for a provision of the regulation to August 3, 1995, and requested comments on the scope of this provision. The agency is further extending the compliance date to August 2, 1996. FDA is taking this action in order to adequately assess comments received on the scope of a particular provision of that rule.

DATES: The final rule published at 58 FR 41348, August 3, 1993, is effective August 3, 1994. The date for compliance with § 211.122(g) for items of labeling (other than immediate container labels) is extended to August 2, 1996. The date of compliance for all other provisions of the final rule remains August 3, 1994.

FOR FURTHER INFORMATION CONTACT:

Thomas C. Kuchenberg, Center for Drug Evaluation and Research (HFD–362), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1046, or

Paul J. Motise, Center for Drug Evaluation and Research (HFD–323), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1089.

SUPPLEMENTARY INFORMATION:

In the **Federal Register** of August 3, 1993 (58 FR 41348), FDA published a final rule that amended the CGMP regulations to require that certain special control procedures be instituted if cut labeling is used. One of these procedures requires the use of ''appropriate electronic or electromechanical equipment to conduct a 100-percent examination for correct labeling during or after completion of finishing operations'' (§ 211.122(g)(2)).

On May 4, 1994, FDA received a citizen petition from five trade associations requesting that the agency take a number of actions including, but not limited to, extending the August 3, 1994, effective date of this rule as it applies to labeling (other than the immediate container labels) as defined in section 201(m) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 321(m)). The petition stated that additional time was needed because of the unavailability of bar code or machine readers as well as other equipment necessary to orient the labeling codes properly, and requested that FDA reopen its administrative record to reassess the scope of a certain provision of the regulation, as discussed below in this document.

On May 6, 1994, the agency received an additional petition from a trade association that requested, among other things, a 1-year stay of the effective date; the petitioner stated that additional time was needed to locate, install, and validate scanning equipment and other necessary equipment to orient items properly for bar code scanning.

Appropriate electronic or electromechanical equipment primarily consists of systems that scan identity codes printed on labeling. If an incorrect code is detected, the defective labeling is ejected from the labeling line. FDA contacted vendors of this equipment and determined that while there was not a general shortage of system hardware, there was a possible shortage of contract engineering firms employed by some drug manufacturers to evaluate, select, purchase, install, qualify, and validate labeling verification systems.

In response to this situation, FDA extended the compliance date of § 211.122(g) as it applied to items of labeling (other than the immediate container label) to assess further the availability of equipment necessary for compliance with the final rule and to evaluate adequately other issues raised by petitioners.

The first petition also requested that the agency reopen the administrative record to receive additional comments on the application of § 211.122(g) to items of labeling (other than that of the immediate container label) as defined in section 201(m) of the act. Both citizen petitions contended that § 211.122(g) expanded the proposed scope of the provision from immediate container labels to all drug product labeling.

In response to the issues raised, FDA agreed to receive comments on this issue and to evaluate those comments in light of the existing language of § 211.122(g). The comment period ended on October 4, 1994, and since that time FDA has had a number of meetings with representatives of the labeling industry and others to determine control options available through current technology and to evaluate this information in light of comments received during the extended comment period.

In order to adequately assess this information, determine whether any possible revision of the regulation should result, and provide industry adequate time to fully comply with a final regulation, FDA is extending the compliance date of § 211.122(g) as its applies to items of labeling other than the immediate container label to August 2, 1996. Should FDA determine, after completing its assessment of the comments, that § 211.122(g) should be retained in its current state or revised, FDA will provide notice of that decision in a future issue of the **Federal Register**. The compliance date for the remainder of § 211.122, including § 211.122(g) as it applies to immediate container labels, was August 3, 1994. The agency emphasizes, however, that § 211.125 makes a waiver of labeling reconciliation conditional on a 100-percent examination for correct labeling performed in accordance with § 211.122(g)(2).

Dated: April 24, 1995.

William B. Schultz,

Deputy Commissioner for Policy.

[FR Doc. 95–10461 Filed 4–27–95; 8:45 am]

BILLING CODE 4160–01–F

21 CFR Part 310

[Docket No. 77N–334S]

RIN 0905–AA06

Topical Drug Products for Over-the-Counter Human Use; Products for the Prevention of Swimmer's Ear and for the Drying of Water-Clogged Ears; Final Rule; Correction

AGENCY: Food and Drug Administration, HHS.